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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN H. WILLIAMS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an indictment may be dismissed because the government failed to present exculpatory evidence to the grand jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 899 F.2d 898. The orders of the district court (Pet. App. 16a-18a, 19a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1990. Petitions for rehearing were denied on April 22, 1991. Pet. App. 28a. The petition for a writ of certiorari was filed on June 24, 1991, and was granted on October 15, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

STATEMENT

1. Between September 1984 and November 1985, respondent obtained loans and renewals of loans from several banks in Tulsa, Oklahoma. In applying for the loans, respondent provided the banks with two types of financial statements. One of the statements, called a "Market Value Balance Sheet," included a list of respondent's "current assets." J.A. 14-43. In financial statements, current assets are generally understood to be cash or assets that can be converted to cash within one year. Pet. App. 2a. Respondent's list of current assets contained a group of "notes receivable," J.A. 14, 24, 34; included in that group were notes totaling between $5.5 and $6.3 million reflecting loans that respondent had made to three venture capital companies—Endex, Inc., Plateau Electronics, and Skyfield Productions, Inc. J.A. 20, 30, 40. Although respondent's balance sheet did not disclose the fact, each of the venture companies was relatively new and had a negative net worth at the time the statements were submitted to the banks; the notes were therefore uncollectible in the short term. Pet. App. 2a.

The second financial document used by respondent was a "Statement of Projected Income and Expense." J.A. 44-46. A major source of respondent's projected income reflected in that statement was interest; that category included interest due on the venture capital notes described above. Because of the precarious

financial condition of the venture companies, no interest could be paid on those notes apart from the funds generated from respondent's own loans to the companies. The financial statements respondent submitted to the banks, however, failed to indicate that the interest income listed on the "Statement of Projected Income and Expense" did not derive from an independent outside source, but came from the funds that respondent himself had invested in the venture companies. Pet. App. 2a-3a.

2. On May 4, 1988, a grand jury sitting in the United States District Court for the Northern District of Oklahoma returned a seven-count indictment against respondent. J.A. 9-13. The indictment charged respondent with knowingly making false statements to federally insured banks for the purpose of influencing the banks to extend loans, in violation of 18 U.S.C. 1014. The allegedly false oral and written statements related to respondent's overvaluation of the notes receivable in his statement of current assets, and the overvaluation of the interest income in his projected income statement. Pet. App. 3a.

After receiving portions of the grand jury transcript in discovery, J.A. 52-53, respondent moved to dismiss the indictment on the ground that the government had failed to present "substantial exculpatory evidence" to the grand jury, as required by *United States* v. *Page*, 808 F.2d 723, 728 (10th Cir.), cert. denied, 482 U.S. 918 (1987). Respondent claimed that his ledgers, tax returns, and other financial records were in the government's possession but had improperly been withheld from the grand jury. Respondent's theory was that those documents were exculpatory because they revealed that he and his accountants had consistently treated the notes receivable and interest income in the same manner as they had

been treated in the presentations to the banks. Respondent also asserted that the government had in its possession and should have presented to the grand jury a five-volume transcript of his deposition, given in connection with his bankruptcy proceedings, in which he explained his methods of accounting and financial reporting in a fashion that he claimed exonerated him. Pet. App. 3a-4a.

In response, the government argued that it had complied with any duty it had to present potentially exculpatory evidence to the grand jury. In particular, the government argued that it had introduced the relevant financial records and account documents pertaining to the charged offenses, and that it had called witnesses before the grand jury who had testified about respondent's confidence in his venture capital investments. See Gov't Response to Defendant's Motion to Dismiss (filed Oct. 3, 1988), at 3-4.

The district court initially denied respondent's motion, concluding that "there has been no substantial exclusion of exculpatory evidence from the purview of the Grand Jury." Pet. App. 17a. Although stating that certain "potentially" exculpatory evidence had not been presented to the grand jury, the court found that the information at issue did not rise to the threshold set by *Page* because a prosecutor is not obligated "to 'ferret out and present every bit of potentially exculpatory evidence.' " *Ibid.*, citing *Page*, 808 F.2d at 728.

On reconsideration, however, the district court reversed itself and dismissed the indictment. The court stated that two categories of evidence in the government's possession constituted "substantial exculpatory evidence" that had been withheld from the grand jury: (1) the bankruptcy deposition, in which respondent explained his financial accounting methods,

and (2) various financial statements, tax records, accounting ledgers, and other documents prepared by respondent and his accountants. Pet. App. 23a, 25a. As the court saw it, that evidence helped explain the alleged false statements on which the charges were based, and it was "substantially exculpatory," because it was germane to respondent's "intent to make materially false statements upon which the banks would rely." *Id.* at 24a.

The court then applied this Court's decision in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988), under which an indictment may be dismissed for a violation of the rules governing grand jury proceedings only if " 'the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." Examining the facts under the *Bank of Nova Scotia* test, the district court concluded that the withheld information "raises reasonable doubt about [respondent's] intent to defraud," such that the grand jury's decision to indict was "gravely suspect." Pet. App. 26a. Accordingly, the court dismissed the indictment without prejudice. *Ibid.*

3. The government took an appeal from the dismissal order, and the court of appeals affirmed. Pet. App. 1a-15a. Citing its decision in *Page*, the court declared that "a prosecutor has the duty to present substantial exculpatory evidence to the grand jury." *Id.* at 5a. The court treated the district court's determination that the government had withheld exculpatory evidence as a finding of fact, and it concluded that the district court's ruling was not clearly erroneous. *Id.* at 4a-5a, 7a-11a.

With respect to the bankruptcy deposition, the court found that although respondent's explanations

of his accounting methods "may seem irrelevant and self-serving under the government's theory of the case, the grand jury must receive any information that is relevant to any reasonable theory it may adopt." Pet. App. 8a. In this case, the court stated, the grand jury could reasonably have accepted a different view of respondent's definition of "current assets" than that offered by the government; if it had, respondent's explanations of his accounting methods "would have been relevant" in tending to establish that he lacked an intent to defraud the banks. *Id.* at 8a-9a.

With respect to respondent's financial records, the court of appeals noted that respondent had consistently reported his income and expenses in the same manner as he had presented them to the banks. The court also observed that the grand jury could have concluded that a "legend" on respondent's financial statements would have put the banks on notice that respondent used a method to account for his current assets that did not conform to generally accepted accounting principles. Pet. App. 9a-10a. In light of those factors, the court concluded that the withheld evidence was "consistent with the possible theory that [respondent] simply did not intend to mislead the banks." *Id.* at 11a. The court of appeals therefore upheld the district court's characterization of the withheld information as exculpatory.[1] *Ibid.*

[1] In addition to arguing that the withheld information was not exculpatory, the government contended that its witnesses had in fact put before the grand jury the substance of the information discussed by the court. The court of appeals declined to decide that issue, however, stating that "the government did not designate the grand jury transcript as a part of the record before us." Pet. App. 11a. On rehearing, the government explained that the grand jury transcript had in fact been designated as part of the record, and that it was only because of an error by the district court clerk that the transcript had not been transmitted to the Tenth Circuit. The government urged the panel to reconsider its holding in light of the transcript. Gov't C.A. Pet. for Rehearing at 4. The panel nevertheless denied rehearing without comment. Pet. App. 28a.

The court of appeals also upheld the district court's determination that the prosecutor's failure to present exculpatory evidence to the grand jury rendered the indictment vulnerable to dismissal under the *Bank of Nova Scotia* standard. The court explained that "the purpose of the grand jury is to render an unbiased, independent, and informed decision based on all relevant evidence"; the "government's theory of the case is not critical." Pet. App. 14a. Reasoning that "[t]he finding of intent to commit a criminal act is a determination the grand jury must make in deciding whether probable cause exists," the court sustained the district court's ruling that "the failure to present evidence relevant to the critical issue of intent rendered the indictment suspect," *ibid.*, and justified dismissal of the indictment without prejudice, *id.* at 14a-15a.

SUMMARY OF ARGUMENT

A. The grand jury is governed by rules significantly different from those that apply to an open, adversarial proceeding such as a criminal trial. The grand jury's function is investigative, not adjudicative. It sits to determine whether there is probable cause to believe that a person should be tried on criminal charges, not to resolve those charges through a trial-type procedure. It works *ex parte*; it is not constrained by formal rules of evidence; and it is not

required to give targets the right to appear, the right to present evidence, or the right to have counsel participate in the proceedings.

In light of its investigative function and independent status, the grand jury has traditionally operated free from judicial review of either the evidence it considers or its decision to return an indictment. Although courts police the grand jury's compliance with the rules and statutes that govern its activities, courts have declined to review the nature or sufficiency of the evidence the grand jury has considered in making its charging decisions. Instead, as this Court has frequently observed, an indictment returned by a legally constituted and unbiased grand jury is sufficient to call for trial of the charge on the merits, without any intercession by a court.

B. A judicially enforceable rule requiring that exculpatory evidence be presented to the grand jury would be incompatible with the traditional role of the grand jury as an independent investigative body whose findings of probable cause are not subject to judicial review. Such a rule erroneously treats the grand jury as if it were a petit jury, convened to conduct a full-blown trial on the merits. The absence of an adversary presentation and the grand jury's limited screening function suggest that the grand jury is not the body that should try defenses to the charges. For courts to administer a rule requiring, in effect, that the prosecutor anticipate and attempt fairly to present the substance of possible defenses would burden the grand jury with exactly the sort of minitrials against which this Court has cautioned. Neither the Fifth Amendment's guarantee of an "indictment of a Grand Jury" nor the supervisory power of the federal courts justifies that level of judicial intrusion in the charging process.

Any marginal benefits from a rule requiring the presentation of exculpatory evidence before the grand jury would be vastly outweighed by the costs such a rule would impose. The task of identifying those cases in which the grand jury would not have indicted if certain evidence had been presented to it would be an exceedingly difficult one, in which the risk of error is high. Even assuming that courts could make that determination accurately, the value to the criminal justice system would be questionable. While the dismissals in a small number of cases might save the time and effort of a trial, courts would spend far more time and effort in processing the great number of pretrial motions to dismiss that the rule would generate, most of which would likely be found meritless. Experience and common sense dictate that there will be very few cases in which a grand jury that was otherwise prepared to indict will refuse to find probable cause upon being apprised of the theory of defense and the allegedly exculpatory evidence that is invoked to support it. Indeed, there is a built-in protection against indictments that are subject to ready rebuttal by defense evidence of which the prosecutor is aware: Prosecutors have every incentive not to seek an indictment where the case has little or no chance of resulting in a conviction when the full record is presented to the petit jury.

The costs of a rule requiring that potentially exculpatory evidence be presented to the grand jury would not be significantly lessened by limiting the duty to "substantial" exculpatory evidence, as the court of appeals purported to do. Such a standard would be extremely difficult for prosecutors to follow or courts to apply. What is more, the court of appeals in this case adopted an extremely liberal standard for

determining when particular evidence is "substantially exculpatory." It adopted the formulation that the grand jury must receive "any information" that is relevant to "any reasonable theory" that the jurors may adopt. Under that standard, prosecutors would routinely be compelled to supplement their grand jury presentations with material submitted by the prospective defendant or with materials that might support some hypothetical theory of defense, simply in order to head off an inevitable challenge to the indictment prior to trial.

In the rare case in which the prosecutor fails to present known exculpatory evidence that likely would have led the grand jury not to indict, the problem can be addressed as a violation of internal guidelines such as those adopted by the Department of Justice. A general rule that imposes substantial costs on the criminal justice system as a whole should not be adopted to deal with those few instances in which the prosecutor has intentionally presented a significantly distorted case to the grand jury.

C. In light of these principles, the court of appeals erred in upholding the dismissal of the indictment in this case. In fact, this case provides a good illustration of the mischief that can flow from the rule that the court of appeals adopted. The investigation in this case was lengthy and complex, and the charged crimes turned on the issue of intent, as to which no single piece of evidence was conclusive. Moreover, the prosecutor introduced evidence that was favorable to respondent on the issue of his intent to defraud the banks. In that setting, the court faced an imposing task in seeking to determine whether the prosecutor had failed to introduce substantial exculpatory evidence before the grand jury. Thus, not only is the

court of appeals' rule unauthorized by any principle of grand jury law, but, as this case demonstrates, it would also impose a cumbersome burden on the district courts that those courts are ill-equipped to bear.

ARGUMENT

THE COURT OF APPEALS ERRED IN DISMISSING THE INDICTMENT ON THE GROUND THAT THE GOVERNMENT FAILED TO PRESENT EXCULPATORY EVIDENCE TO THE GRAND JURY

A. An Indictment That Is Valid On Its Face Is Not Subject To Challenge Because Of Alleged Inadequacies In The Evidentiary Presentation To The Grand Jury

The grand jury enjoys a unique status in the federal criminal justice system. *United States* v. *R. Enterprises, Inc.*, 111 S. Ct. 722, 726-727 (1991). The Fifth Amendment specifically recognizes the grand jury's role as the principal charging body in the federal system, requiring that the prosecution of all "infamous crime[s]" be initiated by grand jury indictment.

The grand jury functions today much as it did 200 years ago. It does not conduct adversarial hearings to determine guilt or innocence, but sits to determine whether there is probable cause to believe that a person should be tried on criminal charges. *United States* v. *Calandra*, 414 U.S. 338, 343 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 686-687 (1972); *Hale* v. *Henkel*, 201 U.S. 43, 59 (1906); *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962).

The grand jury's investigative and screening functions have resulted in the employment of procedures that are quite different from the procedures that have been developed to ensure a fair determination in the trial on the merits. In keeping with the grand jury's

broad investigative role, its proceedings are conducted *ex parte* and are not bound by formal rules of evidence. The grand jury is free to consider hearsay or other incompetent evidence as well as evidence that was illegally obtained. See, *e.g.*, Fed. R. Evid. 1101 (d)(2); *United States* v. *Calandra*, 414 U.S. at 345-346; *United States* v. *Blue*, 384 U.S. 251, 255 & n.3 (1966); *Lawn* v. *United States*, 355 U.S. 339, 349-350 (1958); *Costello* v. *United States*, 350 U.S. 359, 363-364 (1956). Indeed, grand jurors are not confined to the evidentiary record at all, but "may act on tips, rumors, * * * or [on] their own personal knowledge." *United States* v. *Dionisio*, 410 U.S. 1, 15 (1973).

Potential targets do not have a right to appear before the grand jury.[2] Nor do targets have the right to cross-examine witnesses or present evidence in support of their theory of the case.[3] A grand jury wit-

[2] *United States ex rel. McCann* v. *Thompson*, 144 F.2d 604, 605-606 (2d Cir.) (L. Hand, J.) ("[T]he practice [of allowing the target to testify before the grand jury] was utterly unknown at common law, and although grand juries have in recent times occasionally invited persons * * * to appear, they are never obliged to do so."), cert. denied, 323 U.S. 790 (1944); *Duke* v. *United States*, 90 F.2d 840, 841 (4th Cir. 1937) (per curiam) ("There is no right on the part of one whose conduct is being investigated by a grand jury to petition the grand jury or to appear before it, which is guaranteed by the Constitution or otherwise."); *United States* v. *Fritz*, 852 F.2d 1175, 1178 (9th Cir. 1988) (same), cert. denied, 489 U.S. 1027 (1989).

[3] Historically, the grand jury did not receive evidence from potential defendants. As Blackstone noted:

> Th[e] grand jury * * * are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it.

4 W. Blackstone, *Commentaries* *303. Blackstone added that the grand jury should not issue indictments based on "remote possibilities," but should be persuaded of their truth "so far as their evidence goes." *Ibid.* The rule that defendants have no right to present evidence to the grand jury represents the uniform American practice as well. See *United States* v. *Bolles*, 209 F. 682, 685 (W.D. Mo. 1913) (collecting authorities).

ness cannot "insist, as a matter of constitutional right, on being represented by his counsel" in the grand jury room. *In re Groban*, 352 U.S. 330, 333 (1957); Fed. R. Crim. P. 6(b). The constitutional requirement of a public trial does not apply to the grand jury; to the contrary, grand jury proceedings are required to be conducted in secret, and the proceedings are shielded from subsequent disclosure by strict rules of secrecy. See Fed. R. Crim. P. 6(e); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). In contrast to the verdict of a petit jury, which must be the product of a unanimous finding of guilt beyond a reasonable doubt, an indictment may be returned by the grand jury if a bare majority of the grand jurors find probable cause. See Fed. R. Crim. P. 6(a) and (f). And in the event that the grand jury declines to charge a suspect, the prosecutor may re-present the case and obtain an indictment from another grand jury. See *Ex parte United States*, 287 U.S. 241, 250-251 (1932); *United States* v. *Thompson*, 251 U.S. 407, 413-415 (1920).

These characteristics describe an institution that is largely independent of judicial supervision and serves only preliminary investigative and screening functions. Recognizing the character of the institution, this Court has held that it is contrary to the basic

function of the grand jury to permit judicial challenges to the adequacy of the evidence on which an indictment rests. Not only would litigation of such motions compromise grand jury secrecy in many cases, but "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. at 17; see also *United States* v. *R. Enterprises, Inc.*, 111 S. Ct. at 726-727. Rules that would allow the defendant to attack the sufficiency of the record before the grand jury would "make of the grand jury a pawn in a technical game instead of respecting it as a great historic instrument of lay inquiry into criminal wrongdoing." *United States* v. *Johnson*, 319 U.S. 503, 512 (1943).

In *Costello* v. *United States*, 350 U.S. 359 (1956), this Court relied on those considerations in holding that an indictment that is valid on its face is not open to attack on the ground that only hearsay evidence was presented to the grand jury. The Court ruled broadly that, under the Fifth Amendment, "[a]n indictment returned by a legally constituted and unbiased grand jury * * * is enough to call for trial of the charge on the merits." *Id.* at 363 (footnote omitted). The Court explained that "[i]f indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed," because "before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury." *Ibid.* The Court similarly refused to invoke the supervisory

power to allow "defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence." *Id.* at 364. Such an innovation, the Court stated, would conflict with the history of the grand jury as a body whose inquiries are not governed by "technical rules." *Ibid.* Moreover, the Court noted, there is no reason to permit such challenges to the indictment because defendants are guaranteed a fair trial on the merits by the procedural protections that apply in that setting. *Ibid.*

The rule that the Court articulated in *Costello* is one of long standing. As the Court explained in *Ex parte United States*, 287 U.S. at 250, "the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer." In that case, the Court held that the district court could not refuse to issue an arrest warrant based on the indictment; the Court explained that the "question whether there was probable cause for putting the accused on trial was for the grand jury to determine," not for the district court. *Id.* at 249. The "power and duty of the grand jury to investigate," the Court continued, is not subject to the executive or the judicial power, but "is original and complete, and may be exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper." *Id.* at 250-251. See also *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 261 (1988) (a facially valid indictment is not subject to challenge based on "the reliability or competence of the evidence presented to the grand jury"); *Lawn* v. *United States*, 355 U.S. at 349 ("this Court has several times ruled that an indictment returned by a legally constituted non-biased

grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment"); *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599 (1950) (grand jury's decision to indict "is conclusive on the issue of probable cause. As a result the defendant can be arrested and held for trial" without any judicial intervention).

The Court reaffirmed those principles in *United States* v. *Calandra*, *supra*, declaring that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." 414 U.S. at 345. In *Calandra*, the Court held that the Fourth Amendment exclusionary rule does not apply to grand jury proceedings. The Court pointed out that "[p]ermitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings." *Id.* at 349. Grand jury proceedings would be transformed "into preliminary trials on the merits," creating the potential for delay that "might be fatal to the enforcement of the criminal law." *Id.* at 350.[4]

[4] The Court has, of course, taken a different view of violations of the rules or statutes governing grand jury proceedings, where judicial challenges are permissible and relief may be available, at least where the violation is recognized prior to the trial on the merits. See *United States* v. *Mechanik*, 475 U.S. 66 (1986); *Bank of Nova Scotia* v. *United States*, *supra*. Thus, in *Bank of Nova Scotia*, this Court addressed the question of the degree of prejudice required in order to dismiss an indictment once it is found that a prosecutor engaged in misconduct before the grand jury. 487 U.S. at 256-257. This case involves the distinct issue of whether it is misconduct at all for the prosecutor not to present known exculpatory evidence to the grand jury.

B. An Indictment Should Not Be Dismissed On The Ground That The Prosecutor Did Not Present Exculpatory Evidence To The Grand Jury

The court of appeals' holding that an indictment may be challenged because of the prosecutor's failure to disclose exculpatory evidence to the grand jury cannot be reconciled with the principles underlying *Costello* and *Calandra*. In addition, such a rule would be difficult to apply in practice, and it would pose serious practical obstacles to the grand jury's performance of its investigative and charging responsibilities, while offering little by way of countervailing benefit to the criminal justice system.

1. A Rule Requiring the Prosecutor To Present Exculpatory Evidence Is Incompatible with the Grand Jury's Functions

In *United States* v. *Calandra*, this Court recognized that a grand jury investigation is "not an adversary hearing in which the guilt or innocence of the accused is adjudicated." 414 U.S. at 343. A rule that mandates the disclosure of exculpatory evidence to the grand jury is inconsistent with that principle. Because of the *ex parte* nature of its proceedings, the grand jury cannot be expected to anticipate and explore all possible trial defenses before determining whether to indict.

The grand jury has no formal process for the development of defenses. Nor is it possible to create such a procedure without compromising the ability of the grand jury to work in secrecy and to pursue investigations as it sees fit. Encumbering the grand jury with the responsibility of considering alleged exculpatory evidence would extend and complicate its

proceedings, and it would invite the grand jury to move from its limited screening role to the broader role reserved for the petit jury—determining the ultimate question of guilt or innocence.

When the grand jury concludes that the facts before it warrant a public trial to test the prosecution's allegations, it has completed its essential function. It would be a distortion of the grand jury's traditional responsibility to require it to consider not only the evidence submitted by the prosecution that supports a finding of probable cause, but also to consider the evidence submitted by a prospective defendant, or the evidence that the prosecutor anticipates the prospective defendant might seek to introduce at the trial on the merits. Yet that is what the court of appeals' rule would require the grand jury to do.

The court of appeals' rule would give rise to precisely the sort of "preliminary trials on the merits" that the Court warned against in *Calandra*, 414 U.S. at 350, and *Costello*, 350 U.S. at 363. In order to determine whether the prosecutor failed to provide the grand jury with known exculpatory evidence, substantial or otherwise, it would be necessary for the court to examine the transcripts of the grand jury proceedings; to determine what material was in the prosecutor's files and what the prosecutor knew of it; and to hold hearings in order to evaluate the totality of the evidence relating to the charges against the defendant. The court might also have to second-guess the grand jury's decision not to question the prosecutor about particular details of the case or to subpoena additional evidence. And to decide whether exculpatory evidence might have made a difference, the court, in effect, would have to reevaluate the

grand jury's ultimate determination that, on the existing record, an indictment was warranted.[5]

Neither the Constitution nor the supervisory power of the federal courts furnishes support for a rule such as the one adopted by the court of appeals in this case.[6] The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The protection afforded by the constitutional guarantee of a grand jury does not require or contemplate judicial oversight of the

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[5] Three courts of appeals have squarely rejected any rule that the prosecutor must present exculpatory evidence to a grand jury. See *United States* v. *Larrazolo*, 869 F.2d 1354, 1359 (9th Cir. 1989); *United States* v. *Hawkins*, 765 F.2d 1482, 1488 (11th Cir. 1985), cert. denied, 474 U.S. 1103 (1986); *United States* v. *Adamo*, 742 F.2d 927, 937 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985). Two courts of appeals have stated, in more qualified terms, that a prosecutor normally has no such duty; neither of those circuits, however, has ever dismissed an indictment because of the prosecutor's failure to present exculpatory evidence. See *United States* v. *Rivera-Santiago*, 872 F.2d 1073, 1087 (1st Cir.), cert. denied, 492 U.S. 910 (1989); *United States* v. *Vincent*, 901 F.2d 97, 99 (8th Cir. 1990). Two courts of appeals, other than the Tenth Circuit, have spoken with approval of a requirement that prosecutors must disclose substantial exculpatory evidence to the grand jury, but they too have never dismissed an indictment for that reason. See *United States* v. *Ciambrone*, 601 F.2d 616, 622-623 (2d Cir. 1979); *United States* v. *Flomenhoft*, 714 F.2d 708, 712 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984). The Tenth Circuit stands alone in upholding the dismissal of an indictment based on this theory.

[6] The court of appeals gave no indication, either in this case or in the predecessor case, *United States* v. *Page*, 808 F.2d at 727-728, what source of authority purports to justify the court's rule.

competence or sufficiency of the evidence presented to that body. It follows that the defendant is not denied his constitutional right to an "indictment of a Grand Jury" when the indictment rests on a presentation of the facts that is arguably incomplete because there is additional material that could be presented by way of defense.

Nor does the supervisory power of the federal courts justify a differing result. "The balance struck * * * between societal costs and the rights of the accused may not casually be overlooked 'because a court has elected to analyze the question under the supervisory power.'" *Bank of Nova Scotia*, 487 U.S. at 255, quoting *United States* v. *Payner*, 447 U.S. 727, 736 (1980). In light of this Court's explicit determination under the Constitution that the grand jury should be free from rules that would impede its investigative and charging functions, the supervisory power should not be invoked to produce a different outcome. Indeed, this Court has previously rejected supervisory power as a means for defendants to challenge the evidentiary basis for an indictment. See *Costello*, 350 U.S. at 363-364. Significantly, the Federal Rules of Criminal Procedure do not impose a duty on the prosecutor to present exculpatory evidence to the grand jury. Such a duty should therefore not lightly be imposed by a court simply because the court regards it as reflecting good practice. See *United States* v. *Mechanik*, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring) ("Prosecutors have been accorded * * * [wide] leeway in presenting their cases to the grand jury," subject to being "bound by a few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions").

It is the traditional place of the grand jury—not the district judge—to guard against the possibility that a prosecutor may seek an indictment out of malice or personal bias. See *Hale* v. *Henkel*, 201 U.S. at 59 (the function of the grand jury is to "stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will"); *Wood* v. *Georgia*, 370 U.S. at 390; *United States* v. *Mandujano*, 425 U.S. 564, 571 (1976) (plurality opinion); *United States* v. *Mechanik*, 475 U.S. at 73-74 (O'Connor, J., concurring). Grand juries are thought to perform that function precisely because their members bring to the evaluation of the prosecutor's presentation the common sense and values of the community at large. If the jurors have doubts about the evidence presented to them, they are authorized to ask such questions or compel such evidence as they deem necessary to form a sufficient understanding of the case.[7]

The court of appeals' rule departs from that understanding by putting courts, not the grand jurors, in the position of judging the prosecutor's evidentiary presentations. Such judicial intrusion into the workings of the grand jury is not in keeping with the grand jury's constitutional status as an entity that belongs neither to the executive nor to the judicial branch. See *United States* v. *Udziela*, 671 F.2d 995,

[7] Grand juries are fully empowered to investigate crimes based on their own knowledge or information, *Hale* v. *Henkel*, 201 U.S. at 58-66, and to insist upon additional evidence being taken before returning an indictment. "A grand jury 'may compel the production of evidence or the testimony of witnesses as it considers appropriate.'" *United States* v. *R. Enterprises, Inc.*, 111 S. Ct. at 726.

999 (7th Cir. 1982), cert. denied, 457 U.S. 1135 (1982); *United States* v. *Chanen*, 549 F.2d 1306, 1312-1313 (9th Cir. 1977), cert. denied, 434 U.S. 825 (1977); Note, *Grand Jury: A Prosecutor Need Not Present Exculpatory Evidence*, 38 Wash. & Lee L. Rev. 110, 117 (1981) ("a court that dismisses a validly returned indictment is more guilty of interfering with the independence of the grand jury than a prosecutor who presents a slanted case to the grand jury").[8]

[8] That is not to say that courts are without authority to protect against "outrageous or intentional prosecutorial misconduct" before the grand jury that prejudices the rights of the defendant. See *United States* v. *Udziela*, 671 F.2d at 1001; *Bank of Nova Scotia* v. *United States*, 487 U.S. at 254-255. For example, if the prosecutor were intentionally to present perjured testimony on a material issue for the purpose of deceiving the grand jury, it could so subvert the integrity of the grand jury process as to justify judicial intervention. Cf. *Franks* v. *Delaware*, 438 U.S. 154, 164-171 (1978) (discussing analogous considerations in holding that a search warrant affidavit may be challenged when supported by deliberately false police statements). At a certain point, the prosecutor's misconduct may become so grave that the defendant can fairly be said to have been denied his right to be indicted by a grand jury. Cf. *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 802 (1989). But no such concerns about the integrity of the grand jury process are raised by the simple claim, made here, that the prosecutor presented evidence indicating that the defendant committed a crime, without at the same time presenting other evidence supporting a theory that the defendant did not. It is deeply rooted in the history of the grand jury system that defenses need not be tried by the grand jury.

2. *The Burdens of the Proposed Rule Would Significantly Outweigh Any Possible Benefits*

The court of appeals claimed that a rule requiring substantial exculpatory evidence to be revealed to a grand jury would promote "judicial economy," because "[if] a fully informed grand jury cannot find probable cause to indict, there is little chance the prosecution could have proved guilt beyond a reasonable doubt to a fully informed petit jury." Pet. App. 5a, quoting *United States* v. *Page*, 808 F.2d at 728. That argument relies on a perception of judicial economy that is largely illusory.

A defendant's assertion that the prosecutor failed to present known exculpatory evidence that undercuts probable cause will frequently be difficult to assess without a hearing. The court must consider the significance of the evidence on which the defendant relies and gauge its probative value. The court will also have to determine what evidence was, in fact, known to the prosecutor and put before the grand jury. That process in itself may be quite complex: Even if the alleged exculpatory evidence was available to the prosecutor, the court may have to determine whether the prosecutor was aware of the exculpatory evidence and appreciated its potentially exculpatory nature. The court will also have to determine whether the prosecutor decided not to present the evidence in question because, in the prosecutor's view, the evidence was clearly false, and whether that is a sufficient justification for declining to present evidence that is favorable to the defendant.[9]

[9] In the course of an investigation, a prosecutor frequently encounters evidence that he regards as unworthy of belief, such as self-serving statements of the defendant or his allies

After that process, a large majority of such claims will likely fail because the evidence is not sufficiently exculpatory to negate probable cause.[10] Even if the

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or family members, or even statements of an unbiased witness whose observations, in the prosecutor's view, have been conclusively rebutted by other witnesses. Prosecutors typically winnow such evidence and do not deem it necessary to waste the grand jury's time by presenting it and then presenting the evidence that rebuts it. Under the court of appeals' rule, however, the prosecutor may not have that luxury.

[10] The vast majority of cases involving a claim of non-disclosure of exculpatory evidence have concluded that the withheld evidence did not rise to the level requiring disclosure to the grand jury. See, *e.g.*, *United States* v. *Page*, 808 F.2d at 728 (evidence that illicit payoffs were recorded as legitimate payments); *United States* v. *Reid*, 911 F.2d 1456, 1460 (10th Cir. 1990) (criminal history of a witness), cert. denied, 111 S. Ct. 990 (1991); *United States* v. *Dyer*, 750 F. Supp. 1278, 1300-1301 (E.D. Va. 1990) (speeches and reports suggesting that offense at issue was defined ambiguously); *United States* v. *Giovanelli*, 747 F. Supp. 875, 883 (S.D.N.Y. 1989) (impeachment material). Only a handful of district courts have found to the contrary, and none of those cases relied exclusively on a theory of non-disclosure of exculpatory evidence in finding misconduct before the grand jury sufficient to justify dismissal of the indictment. See, *e.g.*, *United States* v. *Gold*, 470 F. Supp. 1336, 1352-1353 (N.D. Ill. 1979) (prosecutor did not allow witness to explain change in viewpoint about validity of report that was alleged to be false and did not present evidence of other reports on the issue); *United States* v. *Phillips Petroleum Co.*, 435 F. Supp. 610, 619-620 (N.D. Okla. 1977) (prosecutor did not present a witness's explanation for failing to report income, which bore on the defendant's intent); *United States* v. *Braniff Airways, Inc.*, 428 F. Supp. 579, 586 (W.D. Tex. 1977) (prosecutor did not present legal defense to antitrust charge based on statutory immunity); *United States* v. *DeMarco*, 401 F. Supp. 505, 513-514 (C.D. Cal. 1975) (prosecutor did not present evidence indicating that defendant was threatened with additional

courts could correctly identify those few cases in which the withheld exculpatory evidence is so powerful that it would likely motivate the grand jury not to indict, it is certain that the courts would spend far more time reviewing meritless claims raised by creative defendants seeking to put the prosecutor on trial for his conduct before the grand jury. The marginal benefits, if any, that would flow from that regime would come at far too high a cost.

The prosecutor has ample incentives not to seek an indictment where the chances of a conviction based on a full record are remote. As this Court has recognized, "[f]or the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained." *Calandra*, 414 U.S. at 351. Prosecutors have nothing to gain and much to lose if they obtain an unsustainable indictment, only to see their case collapse at trial. Moreover, the Due Process Clause requires a prosecutor to turn over to the defendant, after indictment, material exculpatory evidence in the government's possession of which the prosecutor is aware. See *Brady* v. *Maryland*, 373 U.S. 83 (1963); *United States* v. *Agurs*, 427 U.S. 97 (1976). It would make little sense for a prosecutor to suppress powerful exculpatory evidence in order to obtain an indictment, only to be compelled to reveal the evidence to the defendant as soon as the indictment has issued. There is even less incentive to obtain an indictment in a case in which the exculpatory evidence is in the possession of the target from the outset, and where the prospect of embarrassment at trial is certain.

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charges if he did not withdraw his challenge to venue), aff'd on other grounds, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827 (1977).

The costs of the Tenth Circuit's rule would not be reduced by defining the prosecutor's duty to present exculpatory evidence as applying only to "substantial" exculpatory evidence. Pet. App. 5a. In advance of judicial determination, it is difficult to predict where a court would draw the line between "substantial" exculpatory evidence and exculpatory evidence that has some lesser qualitative value for the defense. A wide variety of evidence can be identified as exculpatory to some degree.[11] Indeed, the Tenth Circuit has interpreted its rule to require that "the grand jury must receive any information that is relevant to any reasonable theory it may adopt." Pet. App. 8a. Under that broad standard, prosecutors are confronted with the dilemma of presenting all conceivable evidence that may support some hypothetical defense, or risking protracted pretrial litigation and possible dismissal of the indictment.[12] A rule so nebu-

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[11] The breadth of the types of evidence that might be thought to be exculpatory is illustrated by respondent's motion in this case seeking the disclosure of *Brady* material in 18 separate categories. J.A. 47-50. Defendants relying on the court of appeals' holding in this case could be expected to be equally expansive in their claims that "substantial" exculpatory evidence was not furnished to the grand jury.

[12] Such a situation could easily allow defendants to circumvent the rule that the defense has no right to present evidence to the grand jury. See, *e.g.*, *United States* v. *Law Firm of Zimmerman & Schwartz, P.C.*, 738 F. Supp. 407, 411 (D. Colo. 1990) (district court rejected a claim that the prosecutor had failed to present exculpatory evidence where the prosecutor had presented "detailed letters" and "corresponding exhibits" submitted by the defendant's attorney explaining why an indictment was unwarranted; permitted a character witness to testify for a second time; and presented the grand jury with the defendant's proposed instructions on the law), aff'd *sub nom. United States* v. *Brown*, 943 F.2d 1246, 1257 (10th Cir. 1991).

lous as to pressure the government to prolong its presentations in nearly every case has obvious potential for sowing confusion and for delaying the grand jury's investigation.

The burdens imposed by the court of appeals' rule would be particularly acute in white-collar criminal cases, where investigations frequently generate thousands of documents that could support a myriad of possible theories of defense. Those defenses generally emerge and crystalize long after the investigative phase of a case. To allow retrospective examination of grand jury records in such document-intensive cases could afford defendants a source of discovery to which they are not routinely entitled under the Federal Rules of Criminal Procedure. And to dismiss the indictment, so that the prosecutor could present to the grand jury the evidence that the court considered exculpatory, would impose additional costs and delays and inevitably provoke further disputes about the adequacy of the record that formed the basis for the second indictment.

There will doubtless be occasional cases in which the prosecutor did not present known, exculpatory evidence that likely would have prompted the grand jury not to indict. But a general rule that opens all indictments to challenge, and imposes considerable costs on the criminal justice system as a whole, should not be formulated to deal with the tiny minority of cases in which a fuller evidentiary record would have led to a different outcome.[13] It is internal Department of Justice policy that

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[13] The numbers of such cases have historically been very small. For example, we are unaware of any published decision in the past decade, other than this one, in which a federal court has found that the prosecutor misled the grand jury by

> when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.

United States Attorneys' Manual ¶ 9-11.233, at 18 (1990). Violations of that policy or other more general standards of professional conduct could expose the prosecutor to disciplinary sanctions.[14] The enforcement of such professional standards is a far better way to deal with the isolated instances in which known, material exculpatory evidence is withheld from the grand jury than the sweeping, burdensome, and intrusive rule devised by the court of appeals.

C. The Indictment In This Case Should Not Have Been Dismissed

Respondent's indictment charged him with fraud in the use of false financial statements to obtain loans from banks. The district court determined that certain of respondent's financial documents and his deposition testimony from another proceeding could have

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failing to present exculpatory evidence that would likely have led the grand jury not to indict.

[14] The standard applied internally by the Department of Justice is not equivalent to the court of appeals' rule. The court's standard, particularly as articulated in this case—requiring a prosecutor to present "any information that is relevant to any reasonable theory" of defense, Pet. App. 8a—goes far beyond the Department's policy and imposes amorphous obligations on prosecutors that are enforceable by the sanction of dismissal of the indictment.

created "reasonable doubt" that respondent had fraudulent intent. Accordingly, the district court concluded that the evidence constituted "substantial exculpatory information that would have assisted the grand jury in fairly evaluating intent within the context of all the relevant evidence." Pet. App. 26a. Although the district court's reference to the "reasonable doubt" standard in the context of a grand jury investigation should have highlighted the error in the court's approach, the court of appeals affirmed the district court's ruling. Indeed, the court of appeals went farther, stating that "the grand jury must receive any information that is relevant to any reasonable theory it may adopt," *id.* at 8a, and that the withheld evidence should have been disclosed because it was "consistent with the possible theory that [respondent] simply did not intend to mislead the banks." *Id.* at 11a.

The court of appeals' interpretation of the appropriate role for a court in reviewing the prosecutor's presentation to the grand jury is legally erroneous. The allegedly exculpatory evidence at issue in this case, while perfectly appropriate for the defendant to use in urging the petit jury to acquit, does not represent material that the prosecutor was obligated to present to the grand jury in seeking an indictment. And the reasoning that led the district court and the court of appeals to conclude that the indictment had to be dismissed was premised on a misunderstanding of proper relationship between the grand jury and the court.

This case provides a useful example of the mischief that can flow from a rule of the sort adopted by the court of appeals. The product of a fairly typical financial fraud investigation, this case involved a

lengthy and complex grand jury investigation. As is often true in such cases, the issue of guilt turns on the question of intent. The government introduced a large amount of evidence going to the issue of intent, including some evidence that was favorable to respondent. In such a setting, the district court should have been wary of deciding, on a necessarily limited record, that the prosecutor's failure to present two discrete categories of evidence probably affected the jury's decision to indict. That is particularly true here, since one of the principal items of evidence on which the district court and the court of appeals relied was the defendant's own prior testimony in a separate proceeding, the type of evidence that the fact-finder might ordinarily view skeptically. Moreover, it is far from clear that the fact that respondent made the same representations concerning his financial condition in other financial statements indicated that he had no intent to mislead the banks. The exculpatory effect, if any, of that evidence would depend on the circumstances in which those statements were prepared and used, factors that were not fully revealed by the financial statements themselves. This case thus exemplifies both the burdensomeness of the inquiry required by the court of appeals' rule, and the likelihood that the inquiry will result in error.

In sum, the grand jury was not required to determine conclusively whether respondent in fact intended to defraud the banks from which he sought loans. Acting in compliance with all the rules and statutes governing its proper functioning, the grand jury found probable cause to believe that respondent did act to defraud the banks, and it therefore called upon respondent to answer those charges. Because the prosecutor was not under a judicially enforceable

obligation to present exculpatory evidence to the grand jury, respondent's motion to dismiss the indictment should have been denied.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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